No. 83-2053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM A. ALLAIN, *et al.*,
Appellants,

v.

OWEN H. BROOKS, *et al.*

On Appeal from the United States District Court for the Northern District of Mississippi

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MOTION TO DISMISS OR AFFIRM OF OWEN H. BROOKS, ET AL., APPELLEES

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QUESTIONS PRESENTED

In 1983 this Court vacated the District Court's 1982 court-ordered plan (the "Simpson plan") and remanded the case for reconsideration in light of the 1982 amendment to Section 2 of the Voting Rights Act. *Brooks* v. *Winter*, 103 S.Ct. 2077 (1983). On remand, after a two-and-a-half day trial, the District Court held that the Simpson plan unlawfully diluted black voting strength and denied black voters of Mississippi equal access to the political process in violation of Section 2. Although Mississippi is 35 percent black in population, all five congressional districts in the Simpson plan were majority white in voting age population. The District Court ordered into effect a revised court-ordered plan which created a new Second Congressional District in which black voters constitute 52.83 percent of the voting age population. Appellants are the *ex officio* members of the Mississippi State Board of Election Commissioners, consisting of the Governor, the state Attorney General, and the state Secretary of State. The questions presented are:

1. By failing to raise Questions I and II of their Jurisdictional Statement in the District Court, are these appellants now precluded from raising these questions in their appeal?

2. By failing to allege or prove any direct personal injury to them or to any legally-cognizable state interest resulting from the adoption of the District Court's new plan, do these appellants have standing to challenge the District Court's judgment?

3. Does Section 2 of the Voting Rights Act, as amended in 1982 to prohibit any voting practice which "results in" a discriminatory denial of the right to vote, require proof of discriminatory intent?

4. Does the District Court's 1982 ruling that the Simpson plan satisfies "federal standards" under Section

5 of the Voting Rights Act preclude a finding that the plan is invalid under amended Section 2?

5. Are the District Court's findings of fact that equal black voter participation in Mississippi and in the Delta area is impeded by the effects of past official discrimination and by socio-economic disparities between blacks and whites and that racial bloc voting has prevailed in Mississippi elections and in the 1982 Second District congressional election unsupported by the record and "clearly erroneous" under Rule 52(a), Fed. R. Civ. P.?

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Appellees Owen H. Brooks, et al., eleven black voters of Mississippi who reside in the Delta area of the state,[1] move the Court pursuant to Sup. Ct. Rule 16 to dismiss this appeal, or, alternatively, to affirm that portion of the District Court's judgment invalidating its 1982 court-ordered plan (the "Simpson plan") on findings that that plan, particularly as regards the Second District, results in a denial or abridgement of the right to vote on account

[1] This motion to dismiss or affirm is being filed on behalf of Owen H. Brooks, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert L. Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, who are representatives of a class certified by the District Court comprised of all black registered voters of Mississippi.

of race or color because "the political processes in District 2 in particular are not equally open to participation by members of a class protected by Section 2(a) of the amended Act in that the members of that class have less opportunity than other members of the electrorate to participate in the political processes and to elect representatives of their choices." J.S., Appendix B, p. 25a.

Appellees move the Court to dismiss or affirm this appeal without prejudice to their own appeal, *Brooks* v. *Allain*, No. 83-1865 (docketed May 15, 1984), in which they contend that the District Court's new 1984 court-ordered plan has not provided an adequate remedy for the Voting Rights Act violation because it does not entirely eliminate dilution of minority voting strength found in the prior plan and continues to deny black voters of the Mississippi Delta area an equal opportunity to participate in the political processes and to elect representatives of their choice.

STATEMENT OF THE CASE

We have previously given a more extensive description of this litigation than is contained in the appellants' Jurisdictional Statement in our Jurisdictional Statement in *Brooks* v. *Winter*, No. 83-1865, and in our Motion to Dismiss or Affirm in *Mississippi Republican Executive Committee* v. *Brooks*, No. 83-1722.

MOTION TO DISMISS

Appellees move the Court pursuant to Sup. Ct. Rule 16 to dismiss this appeal, which is being filed on behalf of the *ex officio* members of the Mississippi State Board of Election Commissioners (the Governor, Attorney General, and Secretary of State). These appellants did not raise or argue in the District Court Questions I or II presented in their Jurisdictional Statement. The District Court's opinion is explicit that the question embraced in Question I was raised only by the Mississippi

Republican Executive Committee (the "Republican Defendants"), and not by the state official defendants (J.S., App. A, p. 7a). Question II was not passed on by the District Court. Thus, since these appellants did not raise these issues in the District Court, this Court is precluded from addressing them in this appeal. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980); *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 (1978).

As to Question III, these appellants lack standing required by Article III of the U.S. Constitution to challenge the District Court's decision vacating its prior court-ordered plan and ordering into effect a new court-ordered plan, absent some showing—which has not been made on this record—of personal injury to appellants directly traceable to the District Court's action which is likely to be redressed by action of this Court. *Allen* v. *Wright*, No. 81-757 (July 3, 1984) (slip op. at 12-13); *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, *supra*, 438 U.S. at 80. Also, appellants do not, and can not, make any argument that the District Court's new plan impinges on some legally-cognizable state interest because since 1981 the Mississippi Legislature has failed to act on any new congressional redistricting plan, and the decision below simply substitutes one court-ordered plan for another, very similar court-ordered plan.

For these reasons, this appeal should be dismissed.

MOTION TO AFFIRM

Alternatively, if this Court rules that it has jurisdiction over this appeal and that the questions presented are properly before the Court, the District Court's decision, insofar as it vacates its prior court-ordered plan, should be summarily affirmed.

1. Appellants' argument that the 1982 amendment to Section 2 of the Voting Rights Act, which prohibits any voting practice or procedure which "results in" a discriminatory denial of the right to vote on account of race or language minority status, requires proof of discriminatory purpose is, as the District Court correctly ruled, contradicted by the plain language of Section 2, its legislative history, and judicial and scholarly interpretation.

2. A finding that the prior court-ordered plan is valid under Section 5 of the Voting Rights Act does not preclude a finding that it is invalid under amended Section 2 because Section 2, as amended in 1982, provides a more extensive and comprehensive cause of action for racially discriminatory voting and election practices, and is not limited in any way by the provisions of Section 5.

3. The District Court's findings of fact are amply supported by the evidence presented at trial, and there is no basis for appellants' argument that the District Court's findings of fact are clearly erroneous under Rule 52(a), Fed. R. Civ. P.

I. APPELLANTS' ARGUMENT THAT AMENDED SECTION 2 REQUIRES PROOF OF DISCRIMINATORY PURPOSE FAILS TO PRESENT A SUBSTANTIAL QUESTION.

Appellants in this appeal simply repeat the baseless argument made by the Mississippi Republican Executive Committee in its appeal, J.S., No. 83-1722, pp. 12-22, that the "results" standard of the 1982 amendment to Section 2 of the Voting Rights Act, because it borrows from language used by this Court in *White* v. *Regester*, 412 U.S. 755 (1973),[2] requires proof of discriminatory

[2] Appellants fail to note that the statutory standard also incorporates the Fifth Circuit's decision in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), see S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07. *Zimmer* expressly incorporated an effects standard and interpreted this Court's prior decisions to hold that proof of discriminatory motivation was not required, 485 F.2d at 1304 and n. 16.

intent. The District Court found this argument "to be meritless as it runs counter to the plain language of amended § 2, its legislative history, and judiciai and scholarly interpretation." J.S., App. A, pp. 6a-7a n.5.

The District Court's decision is clearly correct, and it is manifest that appellants' argument is so unsubstantial as not to need further argument. Every court which has construed the 1982 amendment to Section 2—now including the Courts of Appeals for the Fifth, Sixth, Seventh, and Eleventh Circuits—has ruled that the congressional purpose beind it was to eliminate the requirement of proving discriminatory intent to establish a violation of Section 2. See, e.g., *Ketchum* v. *Byrne*, Nos. 83-2044, 83-2065, and 83-2126 (7th Cir. May 17, 1984) (slip op. at 8-10); *United States* v. *Marengo County Commission*, 731 F.2d 1546, 1563-64 (11th Cir. 1984); *Jones* v. *City of Lubbock*, 727 F.2d 364, 375, 378-80 (5th Cir. 1984); *Valesquez* v. *City of Abilene*, 725 F.2d 1017, 1021-23 (5th Cir. 1984); *Buchanan* v. *City of Jackson*, 708 F.2d 1066, 1071-72 (6th Cir. 1983). Every court which has considered the argument made by the appellants here has found it to be totally without merit. See, e.g., *United States* v. *Marengo County Commission*, *supra*, 731 F.2d at 1564 n.29 ("The statute and committee reports, however, could not be clearer [that Section 2 does not contain an intent requirement]."); *Jones* v. *City of Lubbock*, *supra*, 727 F.2d at 380 ("We cannot adopt the City's position that Congress absent-mindedly reimposed a standard that the legislative history so carefully rejects. No court that has considered amended Section 2 has adopted the City's view of the congressional intent."); *Valesquez* v. *City of Abilene*, *supra*, 725 F.2d at 1023 ("This argument is absolutely without merit.").

First, the plain language of the statute itself prohibits any voting practice or procedure which "results in" voting discrimination against a protected group.[3] See J.S., App. C, p. 31a. Under Section 2(b) a violation is shown when protected minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

> Nowhere does this section use the words "intent," "motive," "purpose," or other language which might suggest a subjective standard of proof. On the contrary, the plain meaning of the language of Section 2 is that no proof of intent or purpose to discriminate need be shown.

McKenzie and Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 Harv. Civ. Rights-Civ. Lib. L. Rev. 155, 160 (1984) (footnote omitted).

Second, both the House and Senate committee reports show that the purpose of the Section 2 amendment was "to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision." H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 29 (1981). See also, *id.* at 2, 28-31. "S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [which] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S. Rep. No. 97-417, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 179. See also, *id.* at 15-39, 67-68. The Senate report is particularly explicit that a court may find a Section 2 violation based on the evidentiary factors taken from *White* and *Zimmer* "without any need

[3] "The starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

to decide whether those findings, by themselves, or with additional circumstantial evidence, also would warrant an inference of discriminatory purpose." *Id.* at 28 n.112. The Senate report further states:

> The motivation behind the challenged practice or method is not relevant to the determination. The Committee expressly disavows any characterization of the results tests codified in this statute as including an "intent" requirement, whether or not such a requirement might be met in a particular case by inferences drawn from the same objective factors offered to establish a discriminatory result. Nor is there any need to establish a purposeful design through inferences from the foreseeable consequences of adopting or maintaining the challenged practice.

Id. at 67-68 (footnotes omitted).

Although the statutory language of Section 2(b) and the evidentiary factors which may be used to prove a violation (see *id.* at 28-29) come from *White* v. *Regester*, *Zimmer* v. *McKeithen*, and their progeny, Congress made it explicit that in enacting this statute it was codifying its understanding of pre-*City of Mobile* v. *Bolden* law under those decisions as incorporating a "results" test and that no proof of discriminatory purpose was required. See H.R. Rep. No. 97-227, *supra*, at 29-30; S. Rep. No. 97-417, *supra*, at 28; Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 725-26 (1982).

The opposition in Congress to this new legislation was led by Representative Henry Hyde in the House and Senator Orrin Hatch in the Senate, see Hartman, *Racial Vote Dilution*, *supra*, 50 Geo. Wash. L. Rev. at 725-26 n.236, and it is their statements upon which appellants rely for their argument (J.S., pp. 6-7). Representative Hyde and Senator Hatch, among other opponents, at-

tempted to sabotage this new legislation in Congress by arguing that, because the statutory language was borrowed from this Court's *White* v. *Regester* decision, it incorporates the intent standard which this Court later construed *White* v. *Regester* to contain. See *United States* v. *Marengo County Commission*, *supra*, 731 F.2d at 1564 n.29 (citations to statements of opponents); Hartman, *Racial Vote Dilution*, *supra*, 50 Geo. Wash. L. Rev. at 725-26 n.236; Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, ch. 7 in MINORITY VOTE DILUTION (C. Davidson, ed. 1984), esp. at 154-57 (describing strategy of amendment's opponents). The quotation attributed to Senator Hatch in appellants' Jurisdictional Statement (p. 7) in which—notwithstanding the statutory language and the statements of the purpose of this legislation in the committee reports—he invited the courts to interpret the Section 2 amendment to require proof of discriminatory intent, is extracted from a two-page footnote which Senator Hatch appended to his additional views in the Senate report after he had vigorously argued against the Section 2 amendment, voted against it in committee deliberations, and filed 90 pages of additional views attacking the "results" test and the amendment adopted by the Senate Judiciary Committee. Derfner, *supra*, at 156. Similarly, the statement attributed to Representative Hyde in the Jurisdictional Statement (pp. 6-7) was not even made on the floor of the House of Representatives, but was inserted in the Congressional Record after the floor debate and after the bill had been passed overwhelmingly in the Senate and was returned to the House for agreement with the Senate amendments. Derfner, *supra*, at 157.

These views expressed by Senator Hatch and Representative Hyde were sharply disputed by the Senate and House co-sponsors of the legislation.[4] Senator Kennedy,

[4] "It is the sponsors [of a bill] that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

who was an original co-sponsor of the bill and who helped manage the floor debate in the Senate, repudiated Senator Hatch's interpretation:

> Let there be no question then. We are writing into law our understanding of the White test. And our understanding is that this looks only to the results of a challenged law, in the totality of the circumstances—with no requirement of proving purpose. But should the Highest Court in the land—or a majority of the Court—conclude there is a purpose element in White, then the committee nonetheless has drafted a bill that does not incorporate this requirement, and that is the ultimate legislative intent of the bill we are adopting here tonight.

128 Cong. Rec. S7095 (daily ed. June 18, 1982). Similarly, the other Senate sponsors and supporters of the bill emphasized in the strongest possible terms that the 1982 amendment to Section 2 contains no intent requirement. 128 Cong. Rec. S6930-31 (daily ed. June 17, 1982) (statement of Senator DeConcini); *id.* at S6941-44 (statement of Senator Mathias, an original co-sponsor and floor manager of the bill in the Senate); *id.* at S6956-65 (debate concerning amendment proposed by Senator East to restore the intent test; the amendment was rejected by a vote of 81 to 16); *id.* at S6995-96 (colloquy between Senator Kennedy and Senator Stevens); *id.* at S7119 (daily ed. June 18, 1982) (statement of Senator Dole); *id.* at S7138 (statement of Senator Robert Byrd). During the House debate following Senate approval of the bill, similar views were expressed by Representative James Sensenbrenner, co-sponsor of the House bill who advocated its passage in the House. 128 Cong. Rec. H3841 (daily ed. June 23, 1982).

The District Court's carefully considered interpretation of the amended Section 2 is manifestly correct, and no further argument on this issue is required. No court which has construed this legislation has accepted appellants' erroneous argument, and every court which has

considered it has found it to be totally without merit. Appellants simply reiterate arguments unsuccessfully made by those who opposed passage of this legislation in Congress, and whose position was decisively rejected by overwhelming votes of both houses of Congress. The District Court's interpretation of the amended Section 2 should be summarily affirmed.

II. APPELLANTS' ARGUMENT THAT A FINDING OF VALIDITY UNDER SECTION 5 PRECLUDES A FINDING OF A SECTION 2 VIOLATION IS TOTALLY WITHOUT MERIT.

In their second argument, appellants contend that (1) in its prior decision, rendered in 1982, 541 F. Supp. 1135, *vac'd and remanded*, 103 S.Ct. 2077 (1983), the District Court "specifically found that the Simpson plan met the requirements of Section 5" (J.S., p. 8); and (2) "[t]he legislative history of Section 2 demonstrates that a finding of validity under Section 5 satisfies Section 2" (*id.*). This argument is totally without merit.

First, as appellants themselves recognize (J.S., p. 8), the District Court did not actually grant Section 5 preclearance to the Simpson plan.[5] Following *Upham* v. *Seamon*, 456 U.S. 37 (1982), and *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), the District Court was only required to determine whether or not its court-ordered plan met Federal constitutional and statutory standards, including whether it was sufficient to remedy the Section 5 objection which the Attorney General interposed to the Mississippi Legislature's 1981 statutory plan. See 541 F. Supp. at 1141-43. In our appeal from the District

[5] As a local three-judge District Court in Mississippi, the District Court lacked the authority which Congress has reserved to the District Court for the District of Columbia to grant Section 5 preclearance to any voting law change. *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

Court's 1982 ruling, we contended that the District Court misconstrued *Upham* v. *Seamon* in choosing the Simpson plan as a court-ordered plan and failed fully to remedy the basis of the Attorney General's Section 5 objection. That argument was not passed upon by this Court in our appeal and became moot when this Court vacated the District Court's decision and remanded the case for reconsideration in light of the 1982 amendment to Section 2. *Brooks* v. *Winter*, 103 S.Ct. 2077 (1983). Because the District Court's determinations that the Simpson plan satisfied "these federal considerations" and "federal standards" (541 F. Supp. at 1142) were vacated by this Court in the 1983 appeal, appellants should now be precluded from relying upon them.

Second, appellants fail to recognize the differences between the Section 5 "effect" standard and the Section 2 "results" standard, and they misconstrue the legislative history of the 1982 amendment to Section 2 on this point. In *Beer* v. *United States*, 425 U.S. 130, 141 (1976), this Court construed the Section 5 "effect" test in a limited manner to prohibit only voting law changes "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." This Section 5 "effect" standard, therefore, does not prohibit all racially discriminatory voting laws, but prohibits only voting law changes which diminish the effective voting strength of protected minorities. See *City of Lockhart* v. *United States*, 103 S.Ct. 998 (1983).[6]

Section 2, on the other hand, provides a broader and more comprehensive cause of action for racially discrimi-

[6] The Court has not yet decided whether, in enacting the 1982 amendment to Section 2, Congress intended to incorporate the new Section 2 "results" test in Section 5 determinations. There is persuasive evidence that it did. See, e.g., S. Rep. No. 97-417, *supra*, at 12 n. 31. This question is not presented in this appeal, however, since the alleged District Court determination upon which appellants rely was made prior to the enactment of the Section 2 amendment.

natory voting practices or procedures. It prohibits any voting scheme which "results in" racial discrimination and under which protected minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," whether or not the challenged scheme is a voting law change and whether or not the challenged plan is retrogressive as compared with some prior plan.

The two sections, therefore, have had different standards of proof and different criteria for a violation. Under the Section 5 "effect" standard, the principal question has been whether or not the voting law change has a retrogressive effect on the voting strength of protected minorities. Under the Section 2 "results" standard, the principal question is whether or not "based on the totality of the circumstances" protected minorities are denied equal access to the political process and an equal opportunity to elect candidates of their choice. Unlike Section 5, Section 2 does not necessarily entail a comparison of the numerical voting strength of minorities before and after a challenged redistricting plan or other voting system is adopted.

Accordingly, a challenged voting scheme could pass muster under the Section 5 retrogression standard in effect prior to the 1982 amendment to Section 2 by not diminishing pre-existing levels of minority voting strength, but still violate the Section 2 "results" standard by denying minority voters equal access to the political process.

In enacting the 1982 amendment to Section 2, Congress was aware of the limitations of the Section 5 retrogression standard and employed a different standard by using the word "results" in Section 2 instead of "effect," the Section 5 language. See McKenzie and Krauss, *Section 2 of the Voting Rights Act*, *supra*, 19 Harv. Civ. Rights-Civ. Lib. L. Rev. at 168-71. The legislative history of the 1982 amendment to Section 2 indicates that this

choice of language was a conscious decision not to limit the "results" standard of Section 2 to the "effect"/retrogression test of Section 5:

> By referring to the "results" of a challenged practice and by explicitly codifying the *White* standard, the amendment distinguishes the standard for proving a violation under Section 2 from the standard for determining whether a proposed change has a discriminatory "effect" under Section 5 of the Act.

S. Rep. No. 97-417, *supra*, at 68. The Senate Report shows that Congress, in making this choice, was fully aware of the different standards of proof under Section 2 and Section 5: "Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group." *Id.* at 68 n.224. See also, *id.* at 138-39 (Report of the Senate Subcommittee on the Constitution). This distinction also was made explicit by Representative Sensenbrenner during the floor debate in the House:

> The section 2 standard is not the same as the section 5 standard. This means not only that section 2 is governed by the totality of the circumstances factors, but it also means that the retrogression requirement of Beer against United States does not apply to section 2 cases—although of course, such a retrogression would be relevant evidence in a section 2 case.

128 Cong. Rec. H3841 (daily ed. June 23, 1982).[7]

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[7] Appellants' discussion of eight lines in the Senate report discussing the Savannah municipal annexation (J.S., pp. 8-9) does not constitute a congressional determination that any plan approved under Section 5 must necessarily satisfy Section 2. The Savannah discussion is taken completely out of context. In this section of its report, S. Rep. No. 97-417, *supra*, pp. 34-35, the Senate Judiciary Committee was responding to charges made by Assistant Attorney General William Bradford Reynolds and by the Senate subcommittee, chaired by Senator Orrin Hatch, that the Section 2 "results" test would result in wholesale invalidation of election structures in

Because Section 2 and Section 5 employ different legal standards, and because Congress in enacting the 1982 amendment to Section 2 was careful not to make a Section 2 violation dependent upon a showing of a Section 5-prohibited retrogression, appellants' argument that the District Court's determination—prior to the 1982 amendment to Section 2—that the Simpson plan meets "federal considerations" and "federal standards" precludes a finding of a Section 2 violation clearly is wrong. The District Court's ruling that the Simpson plan failed to pass muster under the 1982 amendment to Section 2 is correct, notwithstanding its prior determination that it met "federal considerations" and "federal standards." [8]

The utter meritlessness of appellants' argument is further demonstrated by court rulings handed down since 1982 striking down redistricting plans approved by the Attorney General under Section 5 for violations of Section 2. In *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La.

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a large number of named cities throughout the country. The Senate Judiciary Committee was making the point that lack of proportional representation for minorities, at-large elections or multimember districts, and one other factor, such as a past history of *de jure* segregated schools, standing alone, would not be sufficient to establish a Section 2 violation (*id.* at 34).

The subcommittee had listed Savannah as one city which could be sued under the new Section 2 because two of the eight city council members were elected at-large, and because only two were black in a city which was 50 percent minority. See *id.* at 157. The Senate Judiciary Committee simply noted that the Justice Department, in preclearing the municipal annexation under Section 5, had determined that "the annexation was not objectionable because the election system provides black voters with adequate opportunity for participation and fair representation." *Id.* at 35.

[8] Contrary to appellants' argument, the District Court did not displace the Simpson plan because it failed to maximize black voting strength or to insure that a black candidate would get elected (J.S., pp. 9-10). To the contrary, it rejected plaintiffs' proposed plans, erroneously we contend (J.S., No. 83-1865), because they could result in the election of a black member of Congress (J.S., App. A, p. 15a).

1983) (three-judge court), the court held that the Section 5 preclearance by the Attorney General of the Louisiana congressional redistricting plan, which contained the distorted "Donald Duck" district which diluted black voting strength, was no bar to a finding that the plan violated Section 2:

> Since the statutory standards of review under § 5 differ from those established by amended § 2, Report on S. 1992 of the Senate Committee on the Judiciary, S. Rep. No. 97-147, 97th Cong., 2d Sess. (1982) at 68, 138-39, U.S. Code Cong. & Admin. News, p. 177, a grant or denial of preclearance pursuant to § 5 is not dispositive of a § 2 claim.

574 F. Supp. at 327 n.1. Similarly, in *Gingles* v. *Edmisten*, Civil No. 81-803-CIV-5 (E.D.N.C. January 27, 1984) (three-judge court), *appeal docketed sub nom. Edmisten* v. *Gingles*, No. 83-1968 (June 2, 1984), 52 U.S.L.W. 3908, the District Court struck down the North Carolina legislative reapportionment plan for Section 2 violations even though it had been precleared by the Attorney General under Section 5. In *Buskey* v. *Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983), the court ruled that the Montgomery, Alabama, city council redistricting plan violated Section 2, even though that plan had passed Section 5 review by the Justice Department.

The legislative history of amended Section 2 and court decisions interpreting Section 2 are unanimous that a finding of Section 5 validity does not in any way preclude a finding of Section 2 invalidity. There is no conflict of authority on this issue, and no substantial question is presented which requires plenary consideration by this Court.

III. THE DISTRICT COURT'S FINDINGS THAT THE SIMPSON PLAN DENIED BLOCK VOTERS EQUAL ACCESS TO THE POLITICAL PROCESS AND AN EQUAL OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellants do not challenge the District Court's finding that the 1982 court-ordered plan, the Simpson plan, diluted black voting strength because it combined the majority black population of the Mississippi Delta area with six predominantly white Hill counties in east-central Mississippi, thereby diminishing the impact of black votes in the Delta area. J.S. App. A, p. 11a; App. B, p. 25a. The District Court concluded that this dilution of black voting strength in the Simpson plan violated Section 2 on evidence showing an "aggregate" (*id.*, p. 8a) of the evidentiary factors which Congress has determined would constitute proof that minority voters are denied equal access to the political process and an equal opportunity to elect candidates of their choice (*id.* at 7a-8a).

The court found that Mississippi has a "long history" of official racial discrimination in voting, which "includes the use of such discriminatory devices as poll taxes, literacy tests, residency requirements, white primaries, and the use of violence to intimidate blacks from registering to vote." *Id.* at 8a-9a. The court found that the effects of this past discrimination "presently impede black voter registration and turnout. Black registration in the Delta area is still disproportionately lower than white registration." The court also found that these effects continue to persist in the relatively low number of black elected officials in Mississippi: "No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties" (*id.* at 9a).

The court found that the "lingering effects of this past discrimination" (*id.* at 10a) persist in socio-economic disparities between whites and blacks. Blacks in the Delta area have disproportionately lower median family income ($7,447 for blacks, as compared with $17,467 for whites), less education (more than half have less than nine years of education, while the majority of whites are high school graduates), unemployment rates which are two to three times higher than the white unemployment rate, and inferior housing conditions (*id.*, p. 10a). This evidence "is also probative of minorities' unequal access to the political process," the District Court determined (*id.* at 9a).

The District Court also concluded that racial bloc voting impedes equal black political participation in Mississippi and in the Delta area. The court found that "blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race" as shown by evidence of "a consistently high degree of racially polarized voting in the 1982 election and previous elections" (*id.* at 11a). Racial bloc voting "operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population," the court found (*id.* at 11a). Since the Second District was not majority black in voting age population "the presence of racial bloc voting in that district inhibits black voters from participating on an equal basis with white voters in electing representatives of their choice" (*id.*).

The November, 1982 general election contest in the Second District under the Simpson plan was largely a head-to-head race between black veteran state Representative Robert Clark and white Republican nominee Webb Franklin. The Court found that "racial campaign tactics" by Franklin in the 1982 election " supports the con-

clusion that Mississippi voters are urged to cast their ballots according to race" and that "[t]his inducement to racially polarized voting operated to further diminish the already unrealistic chance for blacks to be elected in majority white voting population districts." *Id.*, p. 12a.[9]

All of these findings are supported by substantial evidence and are sufficient for the District Court to find a violation of Section 2. See, e.g., *United States* v. *Marengo County Commission*, *supra*; *Jones* v. *City of Lubbock*, *supra*; *Gingles* v. *Edmisten*, *supra*; *Major* v. *Treen*, *supra*; cf. *Rogers* v. *Lodge*, 458 U.S. 613 (1982); *White* v. *Regester*, *supra*.

In this appeal, appellants challenge only two findings of the District Court relating to lower black voter participation rates in the Delta region stemming from the effects of historical official discrimination in Mississippi and socio-economic disparities between whites and blacks in the Delta, and to racial bloc voting in Mississippi elections, particularly in the 1982 congressional election in the Second District (J.S., pp. 10-13).

This issue, also, fails to present a substantial question for review. In recent decisions this Court has empha-

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[9] The trial testimony shows that during the campaign Franklin appealed to white racist sentiments by featuring Clark's picture in his campaign ads, a practice not normally done in Mississippi, by adopting the campaign slogan "He's one of us," a reference to the white Delta in-group, and by using television ads which evoked old segregationist symbols and code words (Tr. 63-87, Ex. P-71):

> You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations.

J.S., App. A, p. 12a.

sized the deference Rule 52, Fed. R. Civ. P., requires reviewing courts to give a trial court's findings of fact. *Rogers* v. *Lodge*, *supra*, 458 U.S. at 622-23 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous." *Pullman-Swint*, *supra*, 456 U.S. at 287. The function of this Court is not to decide factual issues de novo, or to determine whether it would have made the findings the trial court did, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), but is limited to determining whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Great weight should be accorded trial court findings turning on peculiarly local conditions and circumstances "representing as they do a blend of history and an intensely local appraisal . . . in the light of past and present reality, political and otherwise." *Rogers* v. *Lodge*, *supra*, 458 U.S. at 622 (quoting *White* v. *Regester*, *supra*, 412 U.S. at 769-70); see also, *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 468 (1979) (Burger, C.J., concurring in judgment).

The challenged findings are amply supported by substantial evidence and are not clearly erroneous.[10] On the issue of lower registration and turnout by blacks in Mississippi, the State of Mississippi conceded in a companion congressional redistricting case to this one, *Mississippi* v. *Smith*, in a stipulation also admitted in evidence in this

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[10] At the trial, the Brooks plaintiffs presented the testimony of eight plaintiffs through trial depositions, the trial deposition testimony of the Executive Director of the Leadership Conference on Civil Rights on Franklin's voting record on civil rights issues, the testimony of four expert witnesses, and more than 50 documentary exhibits. Defendants (appellants here) presented only two witnesses, a Franklin campaign aide/legislative assistant and the Director of Computer Services and Redistricting of the Republican National Committee, and 12 documentary exhibits.

case, that black citizens in Mississippi generally have lower political participation rates than whites:

> 14. The effect of Mississippi's past history of discrimination in voting and in other areas continues to affect black people in many portions of the state today, which has resulted in a generally lower participation by blacks than whites in the political process. Consequently, proportionately fewer blacks are registered to vote than whites, and black voters turn out at the polls at a lower rate than white voters.

Ex. P-1, pp. 4-5. Thus, appellants in this appeal are attempting to impeach the State's own stipulation, entered into by the same counsel who are representing these state officials in this appeal. These facts were confirmed by the testimony of the plaintiffs, who are black community leaders in the Delta, that black registration in the Delta area is still disproportionately lower than white registration.[11]

Dr. Gordon G. Henderson, a political scientist with extensive experience in analyzing Mississippi elections, also confirmed that blacks in the Delta area have lower participation rates in his statistical analysis of voting behavior in the 1982 general election in the Second District (Ex. P-76). Dr. Henderson found that although in this hotly contested race turnout by whites and blacks was approximately the same when measured as a percentage of registered voters, with black registered voters turning out at a rate of only 1.6 percentage points less than white registered voters, nevertheless there was a gap of 18 percentage points in voter turnout

[11] Ex. P-22, trial deposition of Dr. Robert E. Young, pp. 28-29, 53; Ex. P-23, trial deposition of Gregory Flippins, pp. 11-13, 20; Ex. P-24, trial deposition of Attorney Thomas Morris, pp. 5, 11-12; Ex. P-25, trial deposition of Samuel McCray, pp. 5-7, 8-12, 17-18, 35-38, 65, 92; Ex. P-26, trial deposition of Charles McLaurin, pp. 10-12; Ex. P-27, trial deposition of Jake Ayers, pp. 8-11; Ex. P-28, trial deposition of Clarence Hall, p. 6; Ex. P-30, trial deposition of Attorney Edward Blackmon, Jr., pp. 7, 13-15, 28-30.

when participation was measured by voting age population, rather than by registered voters (Tr. 109-10). These statistics showed that 56.27 percent of the white voting age population turned out to vote in this election, as compared with only 37.58 percent of the black voting age population (Tr. 109-110, Ex. P-76, p. 9). He concluded that this difference

> clearly reflects a well known, long-observed tendency on the part of blacks in Mississippi, including this Second Congressional District, not to be registered. And if they are not registered to begin with, clearly they are not going to be able to vote.

Tr. 110-11.

In addition, Dr. William P. O'Hare, a sociologist specializing in demography and senior research analyst at the Joint Center for Political Studies in Washington, conducted an extensive analysis of the socio-economic differences between whites and blacks in the Second District (Tr. 15-45, Ex. P-66). This analysis showed that blacks in the Delta area are severely disadvantaged in such areas as income, education, employment, housing, and health. Dr. O'Hare testified, based on Census Bureau publications and extensive literature in the field, that these socio-economic characteristics are directly related to political participation rates measured by voter registration and turnout (Tr. 33-39) and concluded that "due to differences in age structure and socio-economic characteristics, blacks do not have an equal opportunity to participate [in the political process in the Second District]" (Tr. 40, also Ex. P-66, p. 40). Thus, the District Court's conclusion that "[t]he evidence of socio-economic disparities between blacks and whites in the Delta area and in the state as a whole is also probative of minorities' unequal access to the political process in Mississippi" is based, not as appellants have represented only on the legislative history of amended Section 2 and case law (J.S., p. 11) or "guessing" (*id.*, p. 12), but upon the

expert witness testimony admitted in this case specifically on this point.

Appellants did not call any witnesses or introduce any evidence to refute the testimony of the black Delta political leaders, Dr. Henderson, or Dr. O'Hare, and thus their testimony is uncontradicted in this record.

To attempt to impeach the District Court's findings, appellants rely exclusively on a 1982 Census document reporting statewide voter registration and turnout rates by race for the November, 1982 election. Under the circumstances, the District Court was entitled to give little weight to this document in making its findings. The Census document reported Mississippi statewide figures only, and did not report racial registration and turnout statistics by race for the Delta area or the Second District (Ex. P-48, p. 64), with which the District Court was primarily concerned. Even statewide, the report still showed disparities between white and black registration and voting (*id.*). The report was based on survey data, resulting in standard errors of 1.6 and 1.9 percentage points for whites and 3.0 and 3.5 percentage points for blacks because of the small number of blacks in the sample (Tr. 60-61, Ex. P-48, p. 64), and no effort was made to verify whether or not the information given by persons in the survey was accurate, that is, whether or not respondents who said they were registered or voted actually were registered or voted (Tr. 62). Dr. O'Hare, in analyzing this Census report, testified that the report standing alone was not sufficient to show that the socio-economic barriers to black political participation about which he testified were no longer a factor in Mississippi voting (Tr. 57-58).

As with voter participation rates, the District Court's findings on racial bloc voting also were based on Mississippi's stipulation in *Mississippi* v. *Smith*, admitted in evidence in this case:

> 15. Analysis of past election returns shows that racial bloc voting has prevailed throughout the State of Mississippi. Those participating in the electoral process suggest that racial bloc voting continues to occur throughout the state today.

Ex. P-1, p. 5. Black political leaders from around the Delta region provided direct testimony, including documentary evidence, from past and recent elections that Mississippi voters have voted and continue to vote for candidates on the basis of race.[12]

Since, as the District Court found, the state defendants "had conceded" racial bloc voting prior to the 1982 congressional election (J.S., App. A., p. 10a), the only issue at trial was whether or not there was racially-polarized voting in the 1982 Second District election. Dr. Henderson performed a regression analysis of the voting in the 1982 Second District election using 1980 Census voting age population data by race and the precinct election returns[13] and concluded that "there was decidedly racial

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[12] Ex. P-22, p. 25 (November, 1983 election for Washington County Circuit Clerk); Ex. P-23, p. 27 (Bolivar County elections); Ex. P-24, pp. 8, 15 (same); Ex. P-25, Nov. 16 dep., pp. 59-65, Nov. 28 dep., pp. 1-13, Exs. 1, 2, and 3 (Quitman County elections); Ex. P-26, pp. 14-24 (Sunflower County 1982 elections); Ex. P-27, pp. 15-16 (1983 Washington County election); Ex. P-28, p. 7 (Issaquena County elections).

There have also been prior judicial findings of racial bloc voting in Mississippi in cases involving the whole state, *Mississippi* v. *United States*, 490 F. Supp. 569, 575 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980), and jurisdictions within the Second District, *Jordan* v. *City of Greenwood*, 534 F. Supp. 1351, 1354 (N.D. Miss. 1982), *vac'd and remanded on other grounds*, 711 F.2d 667 (5th Cir. 1982); *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979) (three-judge court) (Finding 35, slip op. at 7), *aff'd mem.*, 444 U.S. 1059 (1980).

[13] Regression analysis has been widely accepted by the courts as a valid and reliable method of determining whether or not racially-polarized voting exists. See, e.g., *McMillan* v. *Escambia County*, 638 F.2d 1239, 1241-42 n. 6 (5th Cir. 1981), *on rehearing*, 688 F.2d

bloc voting in the general election" "to a high degree" (Tr. 109). His statistical analysis of the voting patterns (Ex. P-76, p. 9) showed that 82.19 percent of the white voters voted for the white candidates in the Second District,[14] with Clark, the black candidate, receiving only 17.89 percent of the white vote, while Clark received 96.49 percent of the black vote (Tr. 109).

Appellants did not do any statistical analysis of voting behavior in the Second District congressional election (Tr. 432). Their own expert, Dr. Thomas B. Hofeller, Director of Computer Services and Redistricting for the Republican National Committee, agreed with Dr. Henderson's conclusion that there was racial bloc voting in that election:

> I think that, as I stated in my deposition, that there is really no doubt in anybody's mind that there are polarized voting patterns as between the races in this area. And that in truth it's not necessary to do a regression analysis in order to ascertain that fact.

Tr. 399; also Tr. 420-21, 431, 434-35. The substance of their case was that, since Clark lost by less than 3,000 votes, there might have been other factors which contributed to his defeat, including philosophical views of the candidates and voters, partisan affiliations and voting behavior, and the like (Tr. 400). However, Dr. Hofeller admitted that he had not conducted any statistical analysis to determine whether any other factors were significant or the weight which might be attributable to other, nonracial factors (Tr. 402-03).[15]

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960 (5th Cir. 1982), *vac'd and remanded on other grounds*, 104 S.Ct. 1577 (1984); *Gingles* v. *Edmisten*, *supra* (slip op. at 48-52); *Major* v. *Treen*, *supra*, 574 F. Supp. at 337-39.

[14] In addition to Franklin, there was a minor white candidate who received few votes.

[15] Judge Higginbotham's special concurring opinion, attached not to the Fifth Circuit's decision in *Jones* v. *City of Lubbock*, 727 F.2d 364 (5th Cir. 1984), but rather to a simple per curiam order denying the petition for rehearing, 730 F.2d 233 (5th Cir. 1984), upon which appellants rely, did not garner the vote of any other judge of the Fifth Circuit, does not represent any ruling of the Fifth Circuit, and is fundamentally inconsistent with the Congressional intent in amending Section 2. The legislative history of the Section 2 amendment shows that one factor to be considered is: "the extent to which voting in the elections of the state or political subdivision is racially polarized." S. Rep. No. 97-417, *supra*, p. 29. Congress was concerned with racially polarized voting which impedes the election opportunities of minority group members, H.R. Rep. No. 97-227, *supra*, p. 30, and with election systems which "permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interests of a racial or language minority." *Id.* Given the descriptions of this criteria in the legislative history, and the cases cited, a descriptive statistical analysis showing a high degree of association between race and voting behavior should be sufficient to meet this criterion. There is no evidence in this legislative history of any Congressional intent to place on plaintiffs in voting rights cases the difficult and expensive burden of proving any motivational analysis, or, in the presence of statistics showing a high correlation between race and voting, of quantifying any of the other variables which might influence elections and excluding the likelihood that factors unrelated to race might have had some influence.

In any event, given that in this case, as in *Jones* v. *City of Lubbock*, there was no statistical evidence presented by the defendants to rebut plaintiffs' proof, even on Judge Higginbotham's analysis there is no basis for concluding that the District Court's findings are clearly erroneous. See 730 F.2d at 236.

In these circumstances, the trial court, which heard the courtroom testimony of these expert witnesses and analyzed their documentary evidence, was in the best position to judge the credibility of the witnesses and the weight to be given to their testimony. Defendants' evidence was considered by the trial court (J.S., App. A, p. 10a). Given the strong statistical evidence showing a high degree of racial bloc voting in the election results, it is unlikely on this proof that other, nonracial factors would have had as strong a bearing on the election results as the racial factor. The District Court's findings on this issue are correct and supported by overwhelming and uncontradicted evidence.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, this appeal should be dismissed, or those portions of the District Court's judgment invalidating the 1982 court-ordered Simpson plan as violative of plaintiffs' rights secured by Section 2 of the Voting Rights Act, as amended in 1982, should be affirmed.

Respectfully submitted,

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